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Thies Sues Coors

Dear Client:

The legal issue of whether distributor agreements trump state franchise law, or vice versa, has been around since breweries started dolling out exclusive territories. And the tug-o-war continues.

In the tradition of the marathon Maris case, the Molson case in NY, and more recently in the Eagle Brands vs A-B case, again Florida provides the Arcadian backdrop for this epic struggle. In an apparent effort to derail Reyes Holding's bid to buy 8.2 million case Thies Distributing, Coors Brewing Company has filed a demand for arbitration against Thies. Recall that Reyes Holdings' deal to buy Thies remains somewhat adrift due to alleged brewer reluctance to approve, particularly by Miller and Coors. In fact, we reported back on March 4 that Coors was set to put the "*official kibosh*" on the deal. Little did we know it would come as a threat to terminate without compensation.

Basically, Coors says that Thies failed to notify them of the deal with Reyes as prescribed in their distributor agreement, which effectively kept Coors from coming up with an alternate buyer. While Coors acknowledges that its distributor agreement with Thies "*does not require a Coors distributor to sell its business to the designated purchaser, [it] does require that the Coors distributor give to Coors the required notice of intent to sell and provide at least a good faith opportunity for the proposed purchaser designated by Coors to offer terms for the purchase acceptable to the selling Coors distributor.*" In other words, Coors says it has a right of first refusal, or more accurately, a right of first negotiation. Coors asks the arbitrator to force Thies to rescind their deal with Reyes and to negotiate "*in good faith*" with Coors' designated purchaser, likely other Florida distributor(s).

But here's the kicker that always strikes fear into any distributor's heart: Coors asks the arbitrator to declare that if Thies closes the deal with Reyes, Coors can terminate them without

compensation. Ooh la-la. Are you ready for it? Here's the money shot:

> "*Coors also requests that the arbitrator issue an award declaring that in the event that Thies and TDLLC [Reyes] elect to close the Proposed Transaction, that (a) Coors is permitted to terminate the Distributorship Agreement with Thies without any payment by Coors, other than the payment for inventory specified in the Distributorship Agreement and (2) [sic] Coors is not required to enter into any agreement by which TDLLC becomes the Coors distributor in the Market Area served by Thies."*

Harsh words for harsh times.

THIES FIRES BACK. Thies fought back with their own legal maneuvering. Thies filed a lawsuit, obtained by BBD late Friday (read it here), against Coors alleging that it is simply interfering in its bid to sell to Reyes Holdings against Florida law. Thies' complaint claims that "*Coors has unreasonably withheld or delayed approval*" of their deal, and that "*Coors is in violation of*" Florida franchise law by calling for an "*illegal right of first refusal to purchase Thies.*" Sound familiar? Yep, these are basically the same issues fought in A-B vs Eagle Brands, because it involves the same Florida statutes.

Florida law prohibits brewers to "*unreasonably withhold or delay its approval of any assignment, sales, or transfer or the stock of a distributor or all or any portion of a distributor's assets --- whenever the person or persons to be substituted meet reasonable qualifications."* Thies goes on to catalogue every time Coors has previously approved Reyes, on at least 8 occasions. So Thies argues that clearly Reyes is an acceptable buyer to Coors.

Thies also says the Florida franchise law "*governs and supercedes*" the distributor agreement. (Recall that A-B argued that since their equity agreement pre-dates Florida franchise law, it should supercede. Florida law was enacted in 1987). Moreover, Thies says that Coors isn't abiding by the very distributor agreement it purports to uphold because it "*failed to provide 90 days notice of its termination*" of Thies. The complaint also notes that the court has "*exclusive jurisdiction*" over this case and so arbitration is out. Thies asks for emergency injunctive relief.

LEGAL ISSUES. Thies' effort to get an emergency injunction is a tough road, simply because they are rarely given. Also, Thies' effort to keep the case out of arbitration is also tough, since in recent cases the Federal Arbitration Act, which favors arbitration, usually trumps state law, says veteran three-tier lawyer Drew Jaglom of Tannenbaum Helpern Syracuse & Hirschtritt.

On the other hand, it's fairly certain that Florida franchise law trumps whatever is in Coors' distributor agreement, says Drew. So they have that going for it.

IMPLICATIONS. So that's were we sit today. From the Reyes' point of view, they clearly would like to see a Thies legal victory here. However, how far do they want to go against Coors' (and Miller's) wishes when they must continue a work-a-day relationship on a variety of matters; plus Reyes has other fish to fry, most immediately their deal to buy Miller distributor Mesa in San

Diego? Also, if Thies is denied emergency injunctive relief, wouldn't it be better for Thies to then give Coors notice of intent to sell, negotiate in good faith, and then put the ball in Coors' court to deny Reyes the distributorship when Coors has already approved them before? In many ways the case hinges on Coors' assertion that their agreement's provision for right of first negotiation is legal under Florida franchise law. That is the question that could go either way.

And then you have Gold Coast, JJ Taylor, and Schenck presumably would want a Coors victory to keep Reyes out of their backyards. However, again, it's a double-edge sword, as clearly those distributors would simultaneously wish to uphold the integrity and efficacy of their state franchise law.

OTHER FACTORS. It's tough to know which way to jump, particularly when you look at the other external factors affecting distributor consolidation. For one thing, Miller and Coors can't sail within a thousand miles of even an appearance of working together on deals because of the Fed's "gun jumping" provisions ahead of merger approval. That is why this Reyes-Thies-Mesa love triangle is likely very awkward for Miller and Coors at the moment, and perhaps the reason Coors is the lone stalking horse in the Florida business (to keep Miller out of it so it can work on the Mesa deal unencumbered).

Many potential sellers seem to be taking a 'wait and see' attitude, especially those distributors that Joe Thompson says have the attitude: "*No pressure, no profits, no problem,"* even though it probably behooves both buyers and sellers to get their deals done before the election, because depending on what happens there, capital gains taxes could conceivably double overnight. And then you have Crown. With any transaction that involves Corona, you have the real possibility of Crown jumping ship and going to the A-B house. And you have the crumbling credit markets. And won't Miller-Coors have more deal-making leverage after the J-V is approved compared to today? And don't brewers typically prefer lower rather than higher distributor valuations? So lots of moving parts. Stay tuned for the fun.

NATTY LIGHT GOING BACK ON TV. KEYSTONE LIGHT TARGET

AdWeek's Mike Beirne reports that A-B plans to advertise Natural Light on TV again after a 10 year hiatus, plus ads in radio, print, and billboard. The TV spots will air beginning April 7 in 30 mid-size markets such as Cincinnati and Columbia, Mo. The ads play on the Natty name, with "Nattyisms" like "Nat-a-pult", "Naturday", and "Nat-Trick". The return to TV, while distressing to many, is likely in response to the rapid growth of Keystone Light. It also may be a play by A-B to get ahead of the curve on the recession.

Until tomorrow, Harry

"*Seek not happiness too greedily, and be not fearful of happiness."*

-Lao-tzu (604 BC - 531 BC)

--------- Sell Day Calendar ----------

Today's Sell Day: 11

Sell days this month: 21

Sell days this month last year: 22

This month ends on a: Mon.

This month last year ended on a: Fri.

YTD sell days Over/Under: +1

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